Detroit Medical Center
Wayne State University

Legal Affairs

Harper University Hospital
3990 John R
7 Brush W
Detroit, MI 48201-2018
313-887-5343 Phone

VIA OVERNIGHT COURIER

July 18, 2005

Court Clerk
Ingham County Circuit Court
Veterans Memorial Courthouse
313 W. Kalamazoo
P.O. Box 40771
Lansing, MI 48901-7971

RE: Commissioner of Insurance v. Michigan Health Maintenance Organization Plans, Inc. – File No. 98-88265-CR

Dear Clerk:

Enclosed for filing please find the Detroit Medical Center's reply to Liquidator's brief on priority issues and proof of service with regard to the above referenced matter.

Very truly yours,

Charles N. Raimi
(313) 887-5381

Enclosures

cc: Honorable James R. Giddings (via overnight courier)
Amy M. Sitner, Esq. (via email)
Joseph T. Aoun, Esq. (via email)

STATE OF MICHIGAN
CIRCUIT COURT FOR 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

In the Matter of:
E. L. Cox, COMMISSIONER OF INSURANCE
FOR THE STATE OF MICHIGAN

Petitioner,

-vs-

File No. 98-88265-CR

Hon. James R. Giddings

A.G. No. 1998053333A

MICHIGAN HEALTH MAINTENANCE
ORGANIZATION PLANS, INC., a
A Michigan health maintenance organization
doing business as Omnicare Health Plan

Respondent.

//

DETROIT MEDICAL CENTER'S REPLY TO LIQUIDATOR'S BRIEF ON PRIORITY ISSUES

DEROIT MEDICAL CENTER

Charles Raimi (P29746)
Deputy General Counsel
3990 John R, 7 Brush West
Detroit, MI 48201
(313) 887-5381

July 18, 2005

INTRODUCTION

The Detroit Medical Center (DMC) was, to say the very least, surprised and distressed by the Liquidator's brief on priority issues. As noted in the Liquidator's brief, the DMC has filed both (i) a claim for unpaid medical bills, and (ii) a separate claim seeking compensation for Omnicare's underpayment of amounts owed to the DMC for medical services provided under the parties' capitation contract (the "Underpayment Claim"). The Liquidator does not take a clear position on the Underpayment Claim. Rather, without explanation or analysis, the Liquidator suggests that depending on how the Underpayment Claim is adjudicated some recoveries may be class 2 priority and some may be class 5. (Brief, pp. 12-13). Thus, the Liquidator argues that the DMC's Underpayment Claim, seeking compensation for medical services provided to Omni members, should be treated less favorably than all other provider claims.

The priority accorded to the DMC's Underpayment Claim is of critical importance. If it is classified less favorably than other provider claims then the Underpayment Claim – regardless of its substantive merits – will be rendered worthless.

The Liquidator's position ignores the fact that the Underpayment Claim is simply a claim for compensation for medical services. If this Court accords class 2 treatment to other provider claims, then there is no basis for treating the DMC's Underpayment Claim differently.

BACKGROUND

The DMC is the state of Michigan's largest provider of vital, "safety-net" medical services to indigent, uninsured and Medicaid patients. The DMC's provision of medical services to tens of thousands of indigent and uninsured patients, combined with the state

of Michigan's historically low Medicaid reimbursement rates, has caused serious financial harm to the DMC.

The DMC's financial problems were severely exacerbated by Omnicare's rehabilitation and insolvency. The DMC lost tens of millions of dollars as a result of the rehabilitation plan entered in this case. As explained below, the DMC also lost additional tens of millions of dollars under its capitation contract with Omni. As a result, in 2003 the DMC was almost forced to close both Detroit Receiving Hospital (the major trauma center serving Detroit) and Hutzel Hospital (which handles the majority of Medicaid funded births in the City of Detroit).

The Underpayment Claim arises from the DMC's contract with Omnicare to provide medical services to Omni members. Omni paid DMC a fixed monthly fee per member ("capitation payments"). The contract was intended to produce aggregate compensation to DMC which approximated Medicaid "fee for service" rates. Those very low rates – which do not even cover the cost of providing care - are the rates providers receive even in the absence of a contract.

However, the capitation fees in the contract were set far too low, so DMC's compensation was tens of millions of dollars below (the already inadequate) Medicaid fee for service rates. It now appears that the rates were set too low because Omnicare concealed the fact that the population of patients for whom DMC agreed to provide medical services had an extraordinarily high level of serious illness. Thus, DMC was underpaid for its services by tens of millions of dollars..

The parties exchanged correspondence on this subject in 2003. DMC pointed out that its compensation for the first contract year was $15 million less than Medicaid fee

for service rates. Omnicare responded with its own analysis showing that the shortfall was "only" $12 million. Ex. A. In hindsight, it is painfully obvious that Omnicare's ability to keep operating after entry of the rehabilitation plan, which operations ultimately permitted Omnicare to sell its membership to Coventry, was financed largely by DMC.

The merits of DMC's Underpayment Claim are not presently before the Court. Nevertheless, the Liquidator, without citing any facts or law, volunteers in her brief that she "is strongly dubious about the validity of this claim." (Brief, p.12). DMC has no clue why the Liquidator would volunteer that unsound and unsupported opinion in this brief, and DMC looks forward to its day in court. More importantly, the merits of the claim are utterly irrelevant if the claim is relegated to a lower priority than other provider claims. As shown below, there is absolutely no legal basis to treat the DMC's Underpayment Claim differently than all other provider claims.

ARGUMENT

I. Conflicting positions on whether provider claims are class 2 claims.

The statute provides:

> "Class 2. Except as otherwise provided in this section, all claims under policies for losses incurred, including third party claims, and all claims of a guaranty association or foreign guaranty association. However, obligations of an insolvent insurer arising out of reinsurance contracts shall not be included in this class." MCL 500.8142(1)(b)

Omnicare, as an HMO, did not issue "policies" as would an insurance company. Based on that fact, and the fact that Michigan law distinguishes between HMO's and insurance companies in many respects, one of the creditors

in the Wellness case made a persuasive argument that provider claims are not class 2. [1]

However, the Liquidator reads the statute much more favorably to providers. Essentially, the Liquidator ignores the statutory reference to the "policies" and argues that any provider claim against an HMO arising from provision of medical services is a class 2 claim. See the Liquidator's brief on priority, p. 11 ("**medical services are the losses**" referenced in the statute identifying class 2 claims). Judge Collette agreed with that position in the Wellness case.

II. If this Court agrees with the Liquidator that provider claims are class 2, then there is no possible basis for treating the DMC's Underpayment Claim differently

The DMC's Underpayment Claim is a claim for compensation for medical services rendered to Omnicare members. The DMC contends that it was underpaid for its services and, therefore, is now seeking additional compensation so that its payment will approximate Medicaid fee for service rates as provided by the contract.

It is true that the DMC has asserted various legal theories in support of its Underpayment Claim, namely, breach of contract, misrepresentation, Medicaid law and impairment of contract. But those theories do not and cannot change the essential nature of the claim, which seeks compensation for medical services. It is black letter law that in classifying the DMC's Underpayment Claim, the Court should consider the substance of the claim – the legal theories asserted are irrelevant. See, e.g., Johnston v City of Livonia, 177 Mich App 200, 207, 208 (1989), (in determining whether plaintiff's claims

[1] DMC did not take a position on priority in the Wellness proceeding.

fell within the jurisdiction of the Tax Tribunal, Court looked to substance of the claims, not labels, because to do otherwise "would exalt form over substance"); Pacific Employers Insurance Company v Michigan Mutual, 204 Mich App 265, 269, 270 (1994), (in deciding whether a complaint is subject to insurance policy coverage, court must focus on "the substance rather than the form of the allegations.")

Because the Court should look to the substance of the Underpayment Claim in determining its priority, the Liquidator's suggestion that some recoveries under that claim should be class 2, and others should be class 5, simply makes no sense. The bottom line is that the DMC is not attempting to collect for anything other than its medical services. If it were, the Liquidator's effort to split hairs might make sense. However, because the DMC is attempting to collect only for medical services to Omnicare members, then if the Court concludes that provider claims are class 2, the DMC's Underpayment Claim should be so classified.

CONCLUSION

The Liquidator is "strongly dubious about the validity of [DMC's] claim." Fine. DMC looks forward to its day in Court where DMC will show that its claim is both legally sound and consistent with fundamental fairness; namely, that DMC's recovery in this proceeding should reflect the painful economic fact that Omnicare's post - rehabilitation operations and the proceeds generated by the sale to Coventry were financed almost exclusively on the back of the DMC.

But with respect to the priority issue, the Liquidator cannot have it both ways. If the Liquidator is correct, and medical providers' claims for compensation are class 2 claims, then DMC's Underpayment Claim should likewise be a class 2 claim.

Detroit Medical Center

By: _____
Charles N. Raimi (P 29746)
Harper University Hospital
3990 John R
7 Brush West
Detroit, MI 48201
(313) 887-5381

July 18, 2005

OmniCare Health Plan
DMC Hospital Claims for 2002
for DMC's Capitated Membership
Priced Out by The DMC and by OmniCare
for Comparison

Summary

	(1) Pmt Amounts Calculated by The DMC	(2) Pmt Amounts Calculated by OmniCare	(3) Difference Increase/ (Decrease) (2) - (1)	(4) Difference as % of DMC Calcs (3) / (1)	(5) Actual Capitation Payments	(6) Cap. Amt. Over/(Under) Pmt. Amts. (Calc. by OmniCare) (5) - (2)	(7) Difference as % of Cap Pmts (6) / (5)
IP Medicaid	24,470,481	23,055,069	(1,415,412)	-5.8%	15,112,978	(7,942,091)	-52.6%
OP Medicaid	13,374,971	12,564,950	(810,021)	-6.1%	9,115,337	(3,449,613)	-37.8%
Total Medicaid	37,845,452	35,620,019	(2,225,432)	-5.9%	24,228,315	(11,391,704)	-47.0%
IP Commercial	4,365,002	3,055,080	(1,309,922)	-30.0%	2,191,869	(863,211)	-39.4%
OP Commercial	3,203,960	3,022,819	(181,141)	-5.7%	2,992,220	(30,599)	-1.0%
Total Commercial	7,568,963	6,077,899	(1,491,064)	-19.7%	5,184,089	(893,810)	-17.2%
Total	45,414,414	41,697,918	(3,716,496)	-8.2%	29,412,404	(12,285,514)	-41.8%

D x 3

COMM ANALYSIS FOR 1ST CONTRACT YEAR SHOWING UNDERPAYMENT, ACCORDING TO CMMI, WAS "ONLY" $8/2 MILLION

STATE OF MICHIGAN
CIRCUIT COURT FOR 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

In the Matter of:
E. L. Cox, COMMISSIONER OF INSURANCE
FOR THE STATE OF MICHIGAN

Petitioner,

-vs-

File No. 98-88265-CR

Hon. James R. Giddings

A.G. No. 1998053333A

MICHIGAN HEALTH MAINTENANCE
ORGANIZATION PLANS, INC., a
A Michigan health maintenance organization
doing business as Omnicare Health Plan

Respondent.

PROOF OF SERVICE

Charles Raimi states that on July 18, 2005 he served by email on Amy Sitner, Esq (asitner@zkac.com), attorney for the Liquidator, a copy of the Detroit Medical Center's reply to Liquidator's brief on priority issues.

Charles N. Raimi (P29746)
Detroit Medical Center

Dated July 18, 2005